

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jun 27, 2011, 4:06 pm
BY RONALD R. CARPENTER
CLERK

NO. 85556-1

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

TESORO REFINING & MARKETING COMPANY,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Petitioner.

**SUPPLEMENTAL BRIEF OF PETITIONER, STATE OF
WASHINGTON, DEPARTMENT OF REVENUE**

ROBERT M. MCKENNA
Attorney General

DONALD F. COFER
Senior Counsel
WSBA # 10896

JEFFREY T. EVEN
Deputy Solicitor General
WSBA # 20367
PO Box 40100
Olympia, WA 98504-0123
(360) 586-0728

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES.....	2
III.	STATEMENT OF THE CASE.....	3
IV.	ARGUMENT	5
	A. Tesoro Bears The Burden Of Demonstrating That State Law Entitles It To The Deduction It Claimed, And The Deduction Must Be Narrowly Construed	5
	B. From Its Inception RCW 82.04.433 Has Provided For A Deduction Only In Computing B&O Tax On The Business Activities Of Wholesaling And Retailing Bunker Fuel, As The Superior Court Correctly Ruled	6
	C. Whether The 2009 Amendment To RCW 82.04.433 Clarified The Law, As The Legislature Determined, Or Changed The Law As Tesoro Contends, The Retroactive Application Of The Amended Statute To Open Claims For Refunds Does Not Violate Due Process.....	13
	D. No Question With Respect To RCW 43.135.035 Is Properly Before The Court.....	19
V.	CONCLUSION	20

TABLE OF AUTHORITIES

Cases

<i>Barnhart v. Sigmon Coal Co.</i> , 534 U.S. 438, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002).....	9
<i>Bowie v. Dep't of Revenue</i> , 171 Wn.2d 1, 248 P.3d 504 (2011).....	8
<i>Densley v. Dep't of Ret. Sys.</i> , 162 Wn.2d 210, 173 P.3d 885 (2007).....	9
<i>Hale v. Wellpinit Sch. Dist.</i> , 165 Wn.2d 494, 198 P.3d 1021 (2009).....	18
<i>HomeStreet, Inc. v. Dep't of Revenue</i> , 166 Wn.2d 444, 210 P.3d 297 (2009).....	6, 7
<i>In re Arbitration of Mooberry</i> , 108 Wn. App. 654, 32 P.3d 302 (2001).....	9
<i>Lake v. Woodcreek Homeowners Ass'n</i> , 169 Wn.2d 516, 243 P.3d 1283 (2010).....	6, 7
<i>McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.</i> , 142 Wn.2d 316, 12 P.3d 144 (2000).....	15
<i>Miller v. Johnson Controls, Inc.</i> , 296 S.W.3d 392 (Ky. 2009).....	17
<i>Simpson Inv. Co. v. Dep't of Revenue</i> , 141 Wn.2d 139, 3 P.3d 741 (2000).....	5
<i>Tesoro Refining & Mktg. Co. v. Dep't of Revenue</i> , 159 Wn. App. 104, 246 P.3d 211 (2010).....	passim
<i>Time Oil Co. v. State</i> , 79 Wn.2d 143, 483 P.2d 628 (1971).....	5

<i>United States v. Carlton</i> , 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994).....	15, 16, 17, 18
<i>United States v. Wells Fargo Bank</i> , 485 U.S. 351, 108 S. Ct. 1179, 99 L. Ed. 2d 368 (1988).....	12
<i>W.R. Grace & Co. v. Dep't of Revenue</i> , 137 Wn.2d 580, 973 P.2d 1011 (1999).....	17
<i>Washington State Farm Bureau Fed'n v. Gregoire</i> , 162 Wn.2d 284, 174 P.3d 1142 (2007).....	14, 15, 18, 19

Statutes

Laws of 1981, ch. 172, § 5.....	8
Laws of 1985, ch. 471, § 6.....	9
Laws of 1985, ch. 190, § 1.....	8
Laws of 1985, ch. 471, § 16.....	9
Laws of 1985, ch. 471, § 16(1)	6
Laws of 1985, ch. 471, § 16(2)	8
Laws of 1987 2d Ex. Sess., ch. 3, § 2	8
Laws of 2009, ch. 494, § 1	13
Laws of 2009, ch. 494, § 2.....	4, 13
Laws of 2009, ch. 494, § 4.....	14, 15
Laws of 2011, ch. 1, § 3.....	19
RCW 43.135.034	19
RCW 43.135.035	19
RCW 43.135.035(1).....	19

RCW 82.04	11
RCW 82.04.220	1
RCW 82.04.240	1, 4, 7
RCW 82.04.250	1, 2, 4, 7
RCW 82.04.270	passim
RCW 82.04.310	10
RCW 82.04.427	10
RCW 82.04.433	passim
RCW 82.04.433(1).....	6, 14
RCW 82.04.440	8
RCW 82.04.440(1).....	1
RCW 82.04.440(2).....	3, 4
RCW 82.04.440(3).....	7
RCW 82.04.450	7
RCW 82.04.4327	9
RCW 82.08	11
RCW 82.32.050	16
RCW 82.32.060	16
RCW 82.32.410	12
RCW 83.32.050	16

Other Authorities

Norman J. Singer & J.D. Shambie Singer, <i>Statutes and Statutory Construction</i> , § 51:3 (7th Ed. 2008)	9
---	---

Rules

RAP 2.5(a)(3)	19
---------------------	----

Regulations

WAC 458-20-193C	12
Wash. State Reg. 86-07-005 (amending WAC 458-20-193C and -175)	12

I. INTRODUCTION

Washington's business and occupation (B&O) taxes are imposed on every person "for the act or privilege of engaging in business activities." RCW 82.04.220. Separate B&O taxes are imposed on different business activities, including manufacturing, wholesaling, and retailing. *See* RCW 82.04.240 (imposing a B&O tax on persons engaged in the business of manufacturing); RCW 82.04.250 (imposing a B&O tax on persons engaged in the business retailing), RCW 82.04.270 (imposing a B&O tax on persons engaged in the business of wholesaling). Subject to applicable credits, exemptions, and deductions, "[e]very person engaging in business under two or more of [the above-referenced] statutes, is taxable under each applicable provision." RCW 82.04.440(1).

Respondent, Tesoro Refining and Marketing Company (Tesoro) engages in Washington in the business activities of manufacturing bunker fuel, and wholesaling and retailing the bunker fuel that it manufactures. CP at 5, 9. Bunker fuel is used to fuel ocean-going ships. CP at 5, 9.

It is undisputed in this case that, under RCW 82.04.433, Tesoro is not required to pay B&O tax on its business activities of wholesaling and retailing the bunker fuel that it manufactures. The question now before the Court is whether Tesoro also is free from paying the manufacturing B&O tax by virtue of the same statute. Since its original enactment in

1985, RCW 82.04.433 has provided for a deduction only in calculating wholesaling and retailing B&O taxes on the business activity of selling bunker fuel, not in calculating B&O tax on manufacturing the fuel.

Additionally, although the Court need not consider it to correctly reject Tesoro's refund claim, a 2009 amendment to RCW 82.04.433 results in the same conclusion. In 2009, the legislature clarified that RCW 82.04.433 does not authorize a deduction in computing B&O tax on the activity of manufacturing bunker fuel. The legislature expressly provided that the 2009 amendment operates prospectively and retroactively. There is no legal impediment to the legislature's retroactive enactment.

Tesoro's business activity of manufacturing bunker fuel is subject to a B&O tax, while business activities of wholesaling and retailing its bunker fuel are not, and its refund claim should be denied.

II. ISSUES

1. Did the 1985 legislature intend the deduction for "amounts derived from sales of fuel" in RCW 82.04.433 to apply only to amounts otherwise taxed for engaging in the activity of selling bunker fuel in Washington under the retailing and wholesaling B&O taxes in RCW 82.04.250 and .270, or was the deduction intended to apply, as the Court of Appeals held, "at the very least, against all chapter 82.04 RCW B&O taxes"?

2. The 2009 legislature's curative amendment of RCW 82.04.433 unambiguously limited the deduction to amounts otherwise taxed for engaging in the activity of selling bunker fuel in Washington. If the 2009 amendment changed the intended meaning of the 1985 statute, does retroactive application of the 2009 amendment as intended by the legislature violate the Due Process Clause of the United States Constitution, where it precludes refund claims by Tesoro and other crude oil refinery owners for manufacturing B&O taxes they paid during any open period before the Governor signed the 2009 amendment?

III. STATEMENT OF THE CASE

Tesoro seeks a refund of B&O taxes that it paid on the activity of manufacturing bunker fuel from January 2000 through December 2007. CP 4-7. Tesoro initially paid manufacturing B&O tax on its activity of manufacturing bunker fuel and other petroleum products in Washington during the period beginning January 2000 through May 2004. CP 10, 165-89. It also reported wholesaling B&O tax or retailing B&O tax on its activity of selling bunker fuel and other petroleum products, but claimed the multiple activities tax credit under RCW 82.04.440(2). Under this statute, Tesoro credited the B&O tax that it paid on manufacturing bunker fuel against its B&O tax liability on wholesaling or retailing the same products. CP 165-88. As a result, Tesoro paid manufacturing B&O tax

for the activity of manufacturing bunker fuel, but did not pay wholesaling or retailing B&O taxes for the activity of selling the same products.

Several years later, Tesoro requested a refund of the manufacturing B&O taxes it paid on manufacturing bunker fuel in Washington, claiming for the first time that it was entitled to a deduction under RCW 82.04.433. The Audit Division of the Department of Revenue (DOR) denied the request, and DOR's Appeals Division later did likewise. CP 5, 10, 210. Tesoro then filed this action, seeking a refund of B&O taxes it had paid from January 2000 through December 2007 on the activity of manufacturing bunker fuel, and used as a credit to offset its wholesaling and retailing B&O tax liability under RCW 82.04.440(2). CP 4-7.

While this action was pending in superior court, the legislature amended RCW 82.04.433 to clarify that the statute authorizes a deduction only against the wholesaling and retailing B&O taxes imposed pursuant to RCW 82.04.250 and .270. Laws of 2009, ch. 494, § 2.¹ In doing so, the legislature explained that although the state "has historically collected tax" from bunker fuel manufacturers, "recently questions have arisen whether the manufacture of bunker fuel is subject to business and occupation tax under RCW 82.04.240." *Id.*, § 1. The 2009 act clarified that manufacturing bunker fuel "is taxable under RCW 82.04.240," *Id.* The

¹ A copy of Laws of 2009, ch. 494, is attached for ease of reference.

legislature also provided that the 2009 amendment “applies both prospectively and retroactively.” *Id.*, § 4.

The governor signed the 2009 amendments into law the day before the superior court heard summary judgment arguments in this case. The trial court granted summary judgment in favor of DOR, concluding that the deduction in RCW 82.04.433, as originally enacted in 1985, did not extend to the manufacturing B&O tax. RP 44-45; CP 316-19.

The Court of Appeals reversed. First, it held that RCW 82.04.433 allows Tesoro to deduct the amounts received from selling bunker fuel in computing its B&O tax on manufacturing the product. *Tesoro Refining & Mktg. Co. v. Dep’t of Revenue*, 159 Wn. App. 104, 115, 246 P.3d 211 (2010). Second, it held that retroactive application of the amendment to RCW 82.04.433 violated due process. *Id.* at 119.

IV. ARGUMENT

A. Tesoro Bears The Burden Of Demonstrating That State Law Entitles It To The Deduction It Claimed, And The Deduction Must Be Narrowly Construed

The legislature intended to impose B&O taxes “upon virtually all business activities carried on within the state.” *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 149, 3 P.3d 741 (2000); *Time Oil Co. v. State*, 79 Wn.2d 143, 146, 483 P.2d 628 (1971). “Taxation is generally the rule and deductions or exemptions are exceptions.” *HomeStreet, Inc. v. Dep’t*

of Revenue, 166 Wn.2d 444, 455, 210 P.3d 297 (2009). The “burden is on the party asserting the deduction to show it qualifies for a tax deduction.” *Id.* “Tax exemptions and deductions must be narrowly construed.” *Id.*

Tesoro accordingly bears the burden of demonstrating it is entitled to a deduction under RCW 82.04.433, as applied to its business activity of manufacturing bunker fuel, and the deduction must be narrowly construed.

B. From Its Inception RCW 82.04.433 Has Provided For A Deduction Only In Computing B&O Tax On The Business Activities Of Wholesaling And Retailing Bunker Fuel, As The Superior Court Correctly Ruled

As originally enacted in 1985, and prior to its amendment in 2009, RCW 82.04.433(1) provided:

In computing tax there may be deducted from the measure of tax amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.

Laws of 1985, ch. 471, § 16(1). The meaning of this statute must be “discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). When this principle, is applied, it is evident that RCW 82.04.433 has never authorized a

deduction in computing B&O tax on the activity of manufacturing bunker fuel.

First, the language of subsection (1) of the original statute authorized a deduction of “amounts derived from *sales* of [certain] fuel.” In this respect, it is important to recall that B&O taxes are separately imposed on numerous statutorily identified business activities. *See, e.g.*, RCW 82.04.240 (imposing B&O tax on activity of manufacturing); RCW 82.04.250 (imposing B&O tax on activity of retailing); RCW 82.04.270 (imposing B&O tax on activity of wholesaling). A person computing manufacturing B&O tax thus is “computing tax” on the business activity of manufacturing. The business activity of manufacturing, however, does not derive *any* “amounts from sales.”² Only the business activities of retailing or wholesaling generate “amounts derived from sales.” In this context, it is an overly broad reading of RCW 82.04.433 to conclude that it authorizes a deduction “in computing tax” on the business activity of

² Tesoro relies upon this Court’s decision in *HomeStreet, Inc.* in construing the phrase “derived from.” Answer to Pet. for Rev. at 12 (citing *HomeStreet, Inc.*, 166 Wn.2d at 454). The meaning of such a phrase, however, is dependent upon the statutory context in which it used. *Lake*, 169 Wn.2d at 526. In the context of RCW 82.04.433, the statute describes a deduction for “amounts derived from the sales of fuel.” This does not describe a deduction from the manufacturing B&O tax, for which the measure of tax is the value of the products. RCW 82.04.240. The phrase “amounts derived from sales” does not equate with “the value of the products.” RCW 82.04.450; *see* Br. of Resp’t at 10-11. If the legislature had intended to provide a deduction from the manufacturing B&O tax, it would have used more direct language to do so, rather than depending on an indirect argument from inference. *See, e.g.*, RCW 82.04.440(3) (providing for the application of the multiple activities tax credit against the manufacturing B&O tax under certain circumstances).

manufacturing for amounts that the business activity of manufacturing does not generate in the first place. *See Bowie v. Dep't of Revenue*, 171 Wn.2d 1, 12, 248 P.3d 504 (2011) (construing statutory language in light of its context).³ Not surprisingly, such a reading also is contrary to Tesoro's tax reporting during the several years that it paid B&O tax on its manufacturing of bunker fuel before more recently asserting its entitlement to a refund.

Second, when the 1985 legislature originally enacted RCW 82.04.433, there was no reason for it to authorize a deduction from the B&O tax on manufacturing. In 1985, RCW 82.04.440 already provided an exemption from *manufacturing* B&O tax to companies, such as Tesoro, that both manufactured and sold the same product in Washington. Laws of 1981, ch. 172, § 5; *see also* Laws of 1985, ch. 190, § 1 (amending RCW 82.04.440 based on then-pending litigation).⁴

³ Former RCW 82.04.433 also originally included a second paragraph, which read: "Nothing in this section shall be construed to imply that amounts which may be deducted under this section were taxable under Title 82 RCW prior to the enactment of this section." Laws of 1985, ch. 471, § 16(2). In 1985, when this statute was enacted, certain taxpayers had an argument—although ultimately an unpersuasive one—that the state could not tax the activity of selling a product consumed on the high seas. Paragraph (2) was thus included in the statute to preserve this argument, but there was no concomitant argument regarding manufacturing. *See Br. of Resp't* at 12-18.

⁴ RCW 82.04.440 was amended in 1987 to provide for a different multiple activities tax credit (MATC). Laws of 1987 2d Ex. Sess., ch. 3, § 2. Under the MATC, a person, like Tesoro, that both manufactures and sells the same product in Washington, is entitled to a credit against its wholesaling and retailing tax liabilities for B&O taxes that it pays on manufacturing the same product. As previously noted, Tesoro took this credit against its wholesaling and retailing B&O tax liabilities for taxes that it paid on manufacturing bunker fuel.

This understanding is confirmed by comparing former RCW 82.04.433 with another provision of the same legislative act in which RCW 82.04.433 was enacted. *In re Arbitration of Mooberry*, 108 Wn. App. 654, 658, 32 P.3d 302 (2001) (statutes enacted as part of the same legislative act are construed together, *in pari materia*, to determine their meaning).⁵ RCW 82.04.433 originally was enacted by Laws of 1985, ch. 471, § 16. Section 6 of the same act enacted RCW 82.04.4327, which authorizes a deduction for “amounts . . . derived from *business activities* conducted by [an artistic or cultural] organization.” Laws of 1985, ch. 471, § 6. When the legislature uses different language within the same legislative act, “courts presume the legislature intends the terms to have different meanings.” *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007). It therefore follows that when the legislature authorized a deduction for “amounts . . . derived from *business activities*” in section 6 of its 1985 act, but authorized a deduction for “amounts derived from *sales*” in section 16 of the same act, it provided for a

⁵ See also *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) (“when Congress includes particular language in one section of a statute but omits it another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (internal quotations omitted)). Tesoro acknowledges that when construing RCW 82.04.433 as it read before its 2009 amendment, the legislative intent of the 1985 legislature is important. Answer to Pet. for Rev. at 13 n.5. There is no better place to find the intent of the 1985 legislature than the 1985 act. See Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction*, § 51:3 (7th Ed. 2008) (statutes enacted as part of the same legislative act are read *in pari materia*).

deduction from all B&O taxes in the first instance but only a deduction from B&O taxes on selling in the second.

Third, the Court of Appeals focused on the introductory language, “[i]n computing tax,” but attributed an untenable meaning to it. The opening phrase, “[i]n computing tax,” does not signal the scope of the deduction, which is determined by the business activity that is described in the statutory language that follows it. RCW 82.04.433. The Court of Appeals plainly erred in concluding that the introductory language of RCW 82.04.433 informs the scope of the deduction.

The Court of Appeals also erred in contrasting the opening phrase of RCW 82.04.433 with those of RCW 82.04.310 through .427. *Tesoro*, 159 Wn. App. at 113 (contrasting opening phrases of RCW 82.04.433 with those of RCW 82.04.310 through .427). The court observed that RCW 82.04.433, like deduction statutes more generally, begins with the phrase, “in computing tax,” while statutes that describe exemptions begin, “this chapter does not apply to.” *Id.* The court then applied the maxim that different statutory language conveys a different intent. *Id.* This maxim is inapplicable, however, because the two phrases play the same role in the respective statutes. These opening phrases merely signal that an exemption or deduction follows, but the scope of the exemption or

deduction is determined based upon the description of the business activity that follows. *See* Brief of Respondent at 4-8.

Even if the different introductory language were significant, the Court of Appeals attributed an untenable meaning to the difference. The Court of Appeals suggested that RCW 82.04.433 may authorize a deduction from *every* state tax in *any* chapter of the Revised Code of Washington, presumably including such taxes as the retail sales tax (chapter 82.08 RCW), and real and personal property taxes (Title 84 RCW). *Tesoro*, 159 Wn. App. at 113. In this respect, the Court of Appeals failed to heed the rule that deductions from taxes are to be narrowly construed. *HomeStreet*, 166 Wn.2d at 455. Moreover, to the extent one were inclined to attribute a different meaning to this opening language, only those sections referring to exemptions suggest application to all of the taxes in RCW 82.04. RCW 82.04.433 does not.

The Court of Appeals also erred in relying on three unpublished administrative determinations as setting forth DOR's construction of the statute. *See Tesoro*, 159 Wn. App. at 114. Such determinations neither state departmental policy, nor have any value as legal precedent, unless the director of DOR publishes them and designates them as precedent. RCW 82.32.410. The director has never designated any of the unpublished determinations cited by the Court of Appeals as precedent.

The properly-adopted administrative rule, WAC 458-20-193C, and not those determinations, comprise DOR's administrative construction.

DOR's contemporaneous construction of the 1985 act has been DOR's official administrative construction of RCW 82.04.433 since its enactment. In March 1986, DOR amended rules relating to wholesaling B&O tax and retailing B&O tax to recognize the deduction provided for RCW 82.04.433. *See* Wash. State Reg. 86-07-005 (amending WAC 458-20-193C and -175). Neither rule has been amended since. Reflecting the fact that the enactment of RCW 82.04.433 had no effect on the B&O tax imposed on manufacturing bunker fuel, DOR added no comparable language to its rules addressing B&O taxes on extracting or manufacturing, *Id.* *See* Br. of Resp't at 24-26.

As the superior court correctly ruled, the analysis of this case ends here, and Tesoro's refund claim fails. *See United States v. Wells Fargo Bank*, 485 U.S. 351, 354, 359, 108 S. Ct. 1179, 99 L. Ed. 2d 368 (1988) (due process issue need not be reached if case can be resolved on the basis of statutory construction).

C. Whether The 2009 Amendment To RCW 82.04.433 Clarified The Law, As The Legislature Determined, Or Changed The Law As Tesoro Contends, The Retroactive Application Of The Amended Statute To Open Claims For Refunds Does Not Violate Due Process

In May 2009, before the trial court heard oral argument in this case, the Governor signed into law an act amending RCW 82.04.433 as follows:

(1) In computing tax there may be deducted from the measure of tax imposed under RCW 82.04.250 and 82.04.270 *[imposing B&O taxes on the business activities of retailing and wholesaling, respectively]* amounts derived from sales of fuel for consumption outside the territorial waters of the United States by vessels used primarily in foreign commerce.

(2) ~~((Nothing in this section shall be construed to imply that amounts which may be deducted under this section were taxable under Title 82 RCW prior to the enactment of this section.))~~ The deduction in subsection (1) of this section does not apply with respect to the tax imposed under RCW 82.04.240, whether the value of the fuel under that tax is measured by the gross proceeds derived from the sale thereof or otherwise under RCW 82.04.450.

Laws of 2009, ch. 494, § 2 (amending RCW 82.04.433) (bracketed and italicized language added). The 2009 amendment clarified that, since its original enactment, RCW 82.04.433 has provided a deduction only in computing wholesaling or retailing B&O taxes, and not manufacturing B&O tax. Laws of 2009, ch. 494, § 1 (intent section, explaining clarifying nature of 2009 amendment). The legislature also expressly declared that

this clarifying language “applies both prospectively and retroactively.”
Laws of 2009, ch. 494, § 4.

The amendment thus leaves no question but that, as RCW 82.04.433 currently reads, the deduction for amounts derived from sales of bunker fuel applies only to the B&O taxes on selling bunker fuel. RCW 82.04.433(1) (cross-referencing RCW 82.04.250, imposing a B&O tax on retailing, and RCW 82.04.270, imposing a B&O tax on wholesaling).

This Court need not apply the 2009 amendment because, as shown above and in DOR’s previous briefing, RCW 82.04.433 has never authorized a manufacturing B&O tax deduction. The amendment raises no due process issue, because it merely clarifies the statute in order to resolve a pending dispute.

“Unquestionably, the Legislature has the power to enact a retrospective statute, unless the statute contravenes some constitutional inhibition.” *Washington State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 302-03, 174 P.3d 1142 (2007) (internal quotation omitted; upholding legislation signed into law two days before the trial court heard argument). “Barring a constitutional limitation an amendment may operate retroactively if the legislature so intended or it is curative.” *Id.* at 303 (internal quotations omitted). The 2009 amendment to

RCW 82.04.433 was intended to operate retroactively because the legislature directly said so. Laws of 2009, ch. 494, § 4.

As this Court has recently explained, the legislature may enact a statute that operates retroactively to resolve a pending case. *Farm Bureau*, 162 Wn.2d at 304; *accord Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 625, 90 P.3d 659 (2004) (“the legislature may pass a law that directly impacts a case pending in Washington courts”). Amendments are often applied retroactively “ ‘where an amendment is enacted during a controversy regarding the meaning of the law.’ ” *McGee Guest Home, Inc. v. Dep’t of Soc. & Health Servs.*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000) (quoting *Tomlinson v. Clarke*, 118 Wn.2d 498, 511, 825 P.2d 706 (1992)).

The 2009 amendment did not change the meaning of the 1985 statute, but even if it had, Tesoro’s due process claim would fail. The United States Supreme Court has established a general rule applicable to retroactive tax legislation:

Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

United States v. Carlton, 512 U.S. 26, 30-31, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray &*

Co., 467 U.S. 717, 729, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984)). Retroactive tax legislation is thus subject only to a rational relationship review standard. *Id.* An amendment to RCW 82.04.433 to preclude “a significant and unanticipated revenue loss” certainly constituted a legitimate purpose. *Carlton*, 512 U.S. at 32.

The Court of Appeals rejected the application of the *Carlton* rule, because it mistakenly understood the 2009 amendment to “reach back for 24 years.” *Tesoro*, 159 Wn. App. at 116. The Court of Appeals was incorrect in this regard. State law precludes assessing back taxes “more than four years after the close of the tax year,” with exceptions not applicable to this case. RCW 83.32.050. The 2009 amendment may also, of course, be applied to open claims for refunds brought by a taxpayer within a similar limitation. RCW 82.32.060. *Tesoro* seeks refunds based upon a refund action it filed in 2008, a little more than a year before the legislature enacted its clarifying amendment. CP 4. The Court of Appeals thus erred in concluding that the amendatory act purportedly authorized the state to apply the amendment retroactively to assess unpaid taxes back to the statute’s original enactment in 1985. State law permits no such thing. RCW 82.32.050.

The Court of Appeals thought that the period of retroactivity was dispositive because the *Carlton* Court mentioned the “modest” period of

retroactivity in that case in support of its conclusion. *Tesoro*, 159 Wn. App. at 116. But while *Carlton* mentioned this as a *relevant* fact, it declined to include it as a component of the rule of law it adopted. *Carlton*, 512 U.S. at 35 (summarizing its holding as simply that the amendment at issue satisfied due process because its retroactive application was “rationally related to a legitimate legislative purpose”); *see also Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 399 (Ky. 2009) (*Carlton* considered the period of retroactivity only as a relevant component of the rational basis test).

This Court has already expressly rejected the notion of an arbitrary time limit on retroactive tax legislation. *W.R. Grace & Co. v. Dep’t of Revenue*, 137 Wn.2d 580, 600, 973 P.2d 1011 (1999). The Supreme Court “has not set a specific duration to the retroactive effect of tax legislation, preferring to rely on legislative decisions in this context.” *Id.* at 603. This Court noted with approval its prior application of legislation “retroactively for a period of some four and half years.” *Id.* at 600 (citing *Digital Equip. Corp. v. Dep’t of Revenue*, 129 Wn.2d 177, 194-95, 916 P.2d 933 (1996)). As noted in DOR’s brief to the Court of Appeals, numerous federal and state courts have refused to strike down tax statutes or legislative tax rules with retroactive application periods comparable to the maximum period at issue in this case. *See Br. of Resp’t* at 45 n.22; *see also Hale v. Wellpinit*

Sch. Dist., 165 Wn.2d 494, 509, 198 P.3d 1021 (2009) (upholding from a challenge based on separation of powers the retroactive application of an amendment to a statute “passed decades ago”).⁶

The Court of Appeals also erred in suggesting that a due process violation might be predicated on the notion that the amendment “is in direct conflict with the reasonable expectations of qualifying taxpayers.” *Tesoro*, 159 Wn. App. at 118. “Tax legislation is not a promise, and a taxpayer has no vested right in the [tax code].” *Carlton*, 512 U.S. at 33; *see also id.* at 34 (rejecting the contention that a taxpayer must be given notice of the risk that tax law might change). As this Court has explained, “No one has a vested right in any general rule of law or policy of legislation which gives an entitlement to insist that it remain unchanged for one’s own benefit.” *Farm Bureau*, 162 Wn.2d at 305 (quoting *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 563, 663 P.2d 482 (1983)).

⁶ The Court of Appeals failed to acknowledge *W.R. Grace*, but instead relied upon two decisions from a bygone era of constitutional jurisprudence to reach the opposite conclusion from the one reached by this Court in *W.R. Grace*. *See Tesoro*, 159 Wn. App. at 118-19 (citing *State v. Pac. Tel. & Tel.*, 9 Wn.2d 11, 17, 113 P.2d 542 (1941), and *Bates v. McLeod*, 11 Wn.2d 648, 120 P.2d 472 (1941)). Both cited cases were the product of narrow restrictions on economic legislation emanating from “an era characterized by exacting review of economic legislation under an approach that ‘has long since been discarded.’” *Carlton*, 512 U.S. at 34 (internal quotation omitted; describing other cases).

D. No Question With Respect To RCW 43.135.035 Is Properly Before The Court

Before the Court of Appeals, but not before the trial court, Tesoro contended that the 2009 amendment to RCW 82.04.433 was invalid under RCW 43.135.035(1).⁷ Tesoro characterized the 2009 amendment as a law that “raises taxes,” and argued that its enactment required a two-thirds vote.

This issue is not properly before the Court for two reasons. First, neither the Department’s petition for review nor Tesoro’s answer to the petition raised this as an issue to be reviewed by this Court. Second, Tesoro did not present this argument to the trial court, only presenting it for the first time before the Court of Appeals. An issue cannot be raised for the first time on appeal unless it raises a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). Tesoro’s argument is not premised on any constitutional right and cannot be raised for the first time on appeal. Rather, Tesoro’s argument rests on the premise that one statute, RCW 43.135.035(1), precluded the legislature’s enactment of a later statute, the 2009 amendment to RCW 82.04.433. This Court has rejected that premise, ruling that one statute may not preclude a future legislature from exercising its lawmaking power. *Farm Bureau*, 162 Wn.2d at 290.

⁷ The voters later repealed RCW 43.135.035 as part of Initiative 1053, replacing it with a statute that is similar in content, but codified as RCW 43.135.034. Laws of 2011, ch. 1, § 3 (Initiative Measure 1053).

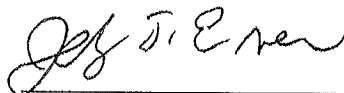
V. CONCLUSION

For these reasons, and for the reasons presented in the Department's brief before the Court of Appeals, this Court should reverse the decision of the Court of Appeals and reinstate the decision of the Superior Court.

RESPECTFULLY SUBMITTED this 27th day of June, 2011.

ROBERT M. MCKENNA
Attorney General

DONALD F. COFER
Senior Counsel, WSBA # 10896



JEFFREY T. EVEN
Deputy Solicitor General, WSBA # 20367
PO Box 40100
Olympia, WA 98504-0123
(360) 586-0728

ATTACHMENT

CERTIFICATION OF ENROLLMENT

SENATE BILL 6096

Chapter 494, Laws of 2009

61st Legislature
2009 Regular Session

BUSINESS AND OCCUPATION TAX--BUNKER FUEL

EFFECTIVE DATE: 05/14/09

Passed by the Senate April 26, 2009
YEAS 29 NAYS 19

BRAD OWEN

President of the Senate

Passed by the House April 26, 2009
YEAS 51 NAYS 45

FRANK CHOPP

Speaker of the House of Representatives

Approved May 14, 2009, 12:14 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 6096** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

May 18, 2009

Secretary of State
State of Washington

SENATE BILL 6096

Passed Legislature - 2009 Regular Session

State of Washington

61st Legislature

2009 Regular Session

By Senator Tom

Read first time 02/25/09. Referred to Committee on Ways & Means.

1 AN ACT Relating to the taxation of the manufacturing and selling of
2 fuel for consumption outside the waters of the United States by vessels
3 in foreign commerce; amending RCW 82.04.433; creating new sections; and
4 declaring an emergency.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** (1) Through this act the legislature intends
7 to address the taxation of persons manufacturing and/or selling bunker
8 fuel. Bunker fuel is fuel intended for consumption outside the waters
9 of the United States by vessels in foreign commerce. Although the
10 state has historically collected tax from bunker fuel manufacturers,
11 recently questions have arisen whether the manufacture of bunker fuel
12 is subject to business and occupation tax under RCW 82.04.240.
13 Pursuant to this act, the activity is taxable under RCW 82.04.240.

14 (2) The legislature finds that at the time the deduction allowed
15 under RCW 82.04.433 was enacted in 1985, it was intended to apply only
16 to the wholesaling or retailing of bunker fuel. In 1987 the
17 legislature enacted the multiple activities tax credit in RCW
18 82.04.440. Enactment of the multiple activities tax credit resulted in
19 changed tax liability for certain taxpayers. In particular, some

1 taxpayers that engaged in activities that had been exempt under the
2 prior multiple activities exemption became subject to tax on
3 manufacturing activities upon enactment of the multiple activities tax
4 credit in its place. The manufacturing of bunker fuel is one such
5 activity.

6 **Sec. 2.** RCW 82.04.433 and 1985 c 471 s 16 are each amended to read
7 as follows:

8 (1) In computing tax there may be deducted from the measure of tax
9 imposed under RCW 82.04.250 and 82.04.270 amounts derived from sales of
10 fuel for consumption outside the territorial waters of the United
11 States, by vessels used primarily in foreign commerce.

12 ~~((Nothing in this section shall be construed to imply that~~
13 ~~amounts which may be deducted under this section were taxable under~~
14 ~~Title 82 RCW prior to the enactment of this section.))~~ The deduction in
15 subsection (1) of this section does not apply with respect to the tax
16 imposed under RCW 82.04.240, whether the value of the fuel under that
17 tax is measured by the gross proceeds derived from the sale thereof or
18 otherwise under RCW 82.04.450.

19 NEW SECTION. **Sec. 3.** The department of revenue must take any
20 actions that are necessary to ensure that its rules and other
21 interpretive statements are consistent with this act.

22 NEW SECTION. **Sec. 4.** This act applies both prospectively and
23 retroactively.

24 NEW SECTION. **Sec. 5.** If any provision of this act or its
25 application to any person or circumstance is held invalid, the
26 remainder of the act or the application of the provision to other
27 persons or circumstances is not affected.

28 NEW SECTION. **Sec. 6.** This act is necessary for the immediate
29 preservation of the public peace, health, or safety, or support of the
30 state government and its existing public institutions, and takes effect
31 immediately.

Passed by the Senate April 26, 2009.

Passed by the House April 26, 2009.

Approved by the Governor May 14, 2009.

Filed in Office of Secretary of State May 18, 2009.

NO. 85556-1

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

TESORO REFINING & MARKETING
COMPANY,

Respondent,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Appellant.

CERTIFICATE
OF SERVICE


I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the Supplemental Brief of Petitioner, State of Washington, Department of Revenue to be served on the following via electronic transmittal and the USPS:

GEORGE C. MASTRODONATO
mastrodonato@carneylaw.com

MICHAEL B. KING
king@carneylaw.com

CARNEY BRADLEY SPELLMAN, P.S.
701 FIFTH AVENUE, SUITE 3600
SEATTLE, WA 98104

DATED this 27th day of June, 2011.


Rosemary Sampson, Legal Assistant

ORIGINAL